Supreme Court, U.S.
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No. 96-2029

In The

Supreme Court of the United States

October Term, 1996

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, formerly known as the BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

KENNETH E. BYRD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S QUESTION PRESENTED

1. Whether a plaintiff in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996), must produce expert testimony regarding the present value of claimed future economic damages as a condition precedent to recovery?

OBJECTION TO PETITIONER'S QUESTIONS PRESENTED

Petitioner has alleged that the second question presented to the Court is "Whether a plaintiff is entitled to recover claimed future pecuniary damages in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996) . . . when the *voir dire* of the jury reveals that no juror knows how to determine the present value of the plaintiff's future pecuniary damages?" Pursuant to Sup. Ct. R. 15, Respondent objects to Petitioner's second question presented because it assumes that the jury was incapable of returning a verdict for future economic damages at present value and that the jury's verdict is not at present value. This fact-based claim was rejected by the Missouri Court of Appeals and need not be considered by the Court. *See* Sup. Ct. R. 10.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case incorrectly notes that "Respondent estimated his earnings from the Railroad would have been Forty Thousand Dollars ($40,000.00) a year at age 49." Petition for Writ of Certiorari at 4. At trial, Respondent introduced evidence of the *net* wages earned by a co-worker, Carlos Hildebrand, who was lower on the seniority roster than Respondent and worked in the same location and craft as Respondent during the years between Respondent's injury and the time of trial. Respondent's Appendix, p. 1a. By virtue of his seniority, Respondent could have worked Hildebrand's job and earned the same amounts as Hildebrand if he had not been injured. Respondent's Appendix, p. 2a. The evidence at the time of trial was that Hildebrand had *net* wages, after state and federal taxes, of $31,057 in 1992; $35,169 in 1993; $40,438 in 1994; and $21,180 for the first six months of 1995. *Id.* at 3a, *et seq.* Thus, Respondent estimated his *net* wage loss at age 49 to be $40,000 per year based upon a comparison to the net earnings of his co-worker, Mr. Hildebrand. Respondent's wages were actually higher than those of Mr. Hildebrand in 1991, the year prior to the accident. Respondent's Appendix, p. 10a.

Petitioner's Statement of the Case also omits other information relevant to the question presented to the Court. Petitioner incorrectly states that Respondent's entire present value calculation was "Forty thousand [dollars] times sixteen years" and that "[o]ther than this comment by counsel, no present value calculation was provided by Respondent." Petition for Writ of Certiorari at 5. However, despite Mr. Hildebrand's average 10.9% annual increase in net wages from 1992 through 1995, Respondent's counsel indicated to the jury to ignore the wage increase when calculating present value. In the portion of the closing argument omitted from Petitioner's Statement of the Case, Respondent's counsel stated that:

> I'm using Carlos Hildebrand's last year working [$49,661] last year he earned as a car man. You can see obviously the wages are going up. Take his net about [$40,438]; round that off to [$40,000] dollars. Ken told you he was gonna work at least until age sixty-five for sixteen years and this is not giving him any raise; this is not taking into account the fact that these wages are going up considerably. And [Hildebrand] this year is ahead of where he was last year. He's headed to make more money this year. I think the present value would be [$640,000]. Forty thousand dollars times sixteen years. That's not even — that's very, very conservative. That's not even giving him a cost of living increase.

Appendix to Petition for Writ, p. 25a.

Petitioner's counsel also spent a significant part of his closing argument explaining to the jury how to calculate present value and informing the jury that any award for future economic damages must be at present value. Counsel for the Petitioner told the jury during closing arguments that "the issue for you to decide is what is the fair and just compensation that Ken Byrd is entitled to receive and have those reduced to present value." Respondent's Appendix, p. 5a. According to Petitioner, the present value calculation is "how much money do I have to put in the bank so that Ken Byrd will receive [$12,694] every year for the next sixteen years; where you at the end of that sixteen years, that bank account is empty. Now how is this going to work?" Respondent's Appendix, p. 8a.

Petitioner's counsel continued with a detailed example of how the present value of $200,000 over 15 years is $150,000:

> [L]et's assume that you can get six per cent return on [$150,000] which means that he will earn [$9,000]. So that at the end of year one you'll have [$159,000] but you'll have to pay out [$12,694]. So you'd end up with less than [$150,000] in year two. If we just ballpark this for math purposes; make it [$13,000] and that will be bringing it down to [$146,000] in year two. You see. Okay. Now I have [$146,000] in the bank. It's going to earn six percent interest and then you multiply that out and come up with [$9,760]. And then you have to pay out twelve thousand dollars off that. So you have another short falling and so on. But that's how you get to present value. And that's — you have to take that all the way through but that is what the Court's instruction is and you are obligated to follow the Court's Instructions because on future pecuniary losses it's got to be reduced to present value so that the time fifteen years is up Ken Byrd is been made whole and all of his wages have basically been paid out of his bank.

Respondent's Appendix, p. 8a, *et seq.*

REASONS FOR DENYING THE WRIT

I.

SUPREME COURT CASE LAW IS CONTRARY TO PETITIONER'S POSITION.

In *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918), the Court approved an instruction in an FELA action requiring the jury to award "such an amount in damages as will fairly and reasonably compensate" the plaintiff. *Id.* at 526-27. Justice Brandeis, writing for a unanimous Court, noted that although a more detailed instruction regarding damages would have been proper if requested, the tendered instruction properly informed the jury of the fact that the plaintiff would have access to the money in a lump sum. *Id.* at 528. Thus, the plaintiff, who apparently did not present any expert testimony or other evidence of the present value of her future economic damages, recovered the amount determined by the jury to be the present value of the proven future economic damages. *Holloway* is interpreted as holding that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value, properly apply the applicable rule." *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). There is no cause for the Court to grant certiorari to review settled law and the Petition should be denied.

II.

SIX DIFFERENT UNITED STATES COURTS OF APPEAL AGREE THAT A PLAINTIFF IN AN ACTION BROUGHT UNDER THE FELA OR JONES ACT DOES NOT BEAR THE BURDEN OF PRODUCING EXPERT TESTIMONY REGARDING THE PRESENT VALUE OF FUTURE ECONOMIC DAMAGES AS A CONDITION PRECEDENT TO RECOVERY.

The United States Courts of Appeal for the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits[1] agree that a plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery under the FELA or Jones Act.[2] Contrary to the representation of the Petitioner, these courts do not require plaintiffs to provide expert testimony of present value because

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1. By virtue of the October 1, 1981, split of the Fifth Circuit Court of Appeals, the holding in *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974) is also binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

2. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974) (action involving an unseaworthiness claim under the general maritime law of the United States and a negligence claim, most likely filed under the Jones Act, 46 U.S.C. § 688, although not specifically stated in the opinion); *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961); *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1250 (7th Cir. 1974), *cert. denied, Chesapeake & Ohio Ry. Co.*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973); *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982) (action under the Jones Act, 46 U.S.C. § 688, which adopts "the entire judicially developed doctrine of liability" from the FELA. *Kerman v. American Dredging Co.*, 355 U.S. 426, 439 (1958)); *Miller v. Union Pacific R.R. Co.*, 900 F.2d 223, 226 (10th Cir. 1990).

it would be "unfair to force the plaintiff to reduce his damages," but rather because of their belief that juries, if instructed to return verdicts at present value, can properly apply the rule based upon their own experiences with the time value of money and investments. Petition for Writ of Certiorari at 16; *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). Similarly, the Court has noted that it is "a matter of common knowledge that . . . the best and safest investments . . . yield only a moderate return" and that "[i]t is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489-91 (1916).

III.

THE REASONING OF THE ONLY APPELLATE COURT IN THE NATION THAT ACCEPTS THE PETITIONER'S POSITION WAS REJECTED BY SUBSEQUENT APPELLATE COURTS TO CONSIDER THIS ISSUE.

The only appellate court to decide the question presented in the case at bar in favor of Petitioner's position is the Third Circuit Court of Appeals in a line of cases starting with *Ballantine v. Central R.R. of New Jersey*, 460 F.2d 540 (1972), *cert. denied*, 409 U.S. 879 (1972). However, the *Ballantine* court based its opinion not upon an interpretation of any decision of this Court or a review of the legislative history of the FELA, but rather simply upon a belief that American juries are not capable of applying the present value rule without expert testimony. *Id.* at 543-44. The reasoning of the Third Circuit has been rejected by subsequent appellate courts to consider the issue. *E.g., Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974); *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249-50 (7th Cir. 1974), *cert. denied, Chesapeake & Ohio Ry. Co.*, 419

U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied*, *St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973).

Petitioner attempts to support its position with the Court's reversal of a Fourth Circuit opinion in *Chesapeake & Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988) (mem.). However, the Court's memorandum reversal in *Aldridge* simply reaffirmed the long line of cases holding that the failure to instruct on present value in an FELA action is error. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 340-41 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (*per curiam*); *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). The jury in the present case was properly instructed to return any award for future economic damages at present value.

Further, the plaintiff in *Aldridge* did not produce expert testimony of the present value of his future economic damages. *Aldridge v. Baltimore & Ohio R.R. Co.*, 789 F.2d 1061, 1066 (4th Cir. 1986), *aff'd*, 814 F.2d 157 (4th Cir. 1987) (en banc). If the law actually was as advocated by Petitioner, the Court would not have vacated the Fourth Circuit's opinion, but rather would have directed a verdict in favor of the defendant railroad for plaintiff's failure to establish an element of his *prima facie* case or remanded with instructions to allow plaintiff the opportunity to introduce the necessary expert testimony of present value. Therefore, *Aldridge* supports the rationale underlying the clear majority position that a properly instructed jury is capable of returning a verdict for future economic damages at present value without expert testimony based upon the jurors' everyday experiences with the time value of money and investments.

IV.

THERE IS NO CONFLICT BETWEEN THE STATE SUPREME COURTS THAT HAVE CONSIDERED THIS ISSUE.

Respondent's research has discovered only two state supreme court cases that have decided the issue of whether the plaintiff in an FELA action bears the burden of producing expert testimony of present value: *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212 (Va. 1994) and *Anglim v. Missouri Pacific R.R. Co.*, 832 S.W.2d 298 (Mo. banc 1992), *cert. denied*, *Missouri Pacific R.R. Co.*, 506 U.S. 1041 (1992). Both courts have held that the plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery. *Casale*, 441 S.E. 2d at 216; *Anglim*, 832 S.W.2d at 308-09.

Contrary to the representation of the Petitioner, there is no split of authority in the state supreme courts, nor are the state supreme courts "making up their own rules" with regard to the present value issue. Petition for Writ of Certiorari at 13. The fact that only two state supreme courts have even reached this issue is indicative that the law in this area is well-settled. Petitioner erroneously contends that in *Reusch v. Seaboard System R.R.*, 566 So. 2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), the Supreme Court of Alabama "held that the plaintiff in a FELA action has the burden to produce evidence relating to the present value of future pecuniary damages." Petition for Writ of Certiorari at 12. However, the Supreme Court of Alabama clearly never reached the issue.

In support of his claim of future economic losses, Reusch testified only to his earnings for the five years prior to his accident and in the year of the accident. *Reusch*, 566 So. 2d at

492. The *Reusch* court held that, at most, the plaintiff "produced only a portion of the evidence necessary to ascertain his stream of earnings." *Id.* This Court has noted that an award of a lump sum for future economic damages involves two steps, the first of which is computation of the lost stream of earnings. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536 (1983). Reusch failed to produce enough evidence to calculate the lost stream of future earnings, the *first* step in awarding a present lump sum for future economic damages. *Reusch*, 566 So. 2d at 492. Accordingly, by definition, the *Reusch* court did not even reach the question presented of whether the plaintiff must produce expert testimony of the present value of future economic damages, the *second* step in the calculation. The state supreme courts that have reached and considered the question in the case at bar are in agreement that an FELA plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery.

V.

PETITIONER'S FACT-BASED CLAIM THAT THE *VOIR DIRE* ESTABLISHED THAT THE JURY COULD NOT FOLLOW THE PRESENT VALUE INSTRUCTION WAS DECIDED BY THE STATE APPELLATE COURT AND SHOULD NOT BE REVIEWED BY THE COURT.

Petitioner opines that the *voir dire* examination sufficiently distinguishes the case at bar from the numerous appellate decisions, *supra*, which base their holdings on the Court's decision in *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918) and the belief that average jurors can apply the present value rule as a result of their everyday experiences with investments and the earning power of money. Petitioner's fact-based claim — that the *voir dire* established that the jury could not and did not return a verdict at present value — was rejected

by the Missouri Court of Appeals. *Byrd v. Burlington Northern R.R. Co.*, 939 S.W.2d 416, 417-18 (Mo. Ct. App. 1996). As such, the Court need not address Petitioner's second question presented because the asserted error is an "erroneous factual finding or misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Furthermore, on the merits, the trial court below properly instructed the jury to return any award for future pecuniary damages at present value. The *voir dire* responses fail to establish that the potential jury members were not aware that a dollar today was worth more than a dollar payable in the future. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). Nor did the *voir dire* questioning touch upon the juror's everyday experiences regarding today's economy and the earning value of money. *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1250 (7th Cir. 1974), *cert. denied*, *Chesapeake & Ohio Ry. Co.*, 419 U.S. 1013 (1974). Rather, the *voir dire* panel members were asked, before hearing any evidence of lost earnings or arguments of counsel, whether they knew how to "reduce a future pecuniary damage at present value."[3] The basis of the Sixth Circuit's *McKinley* opinion, and the Fifth, Seventh and Eighth Circuits that cite *McKinley* with approval, is that jurors are "generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments." *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). The fact that no members of the jury knew how to "reduce a future pecuniary damage at present value" *before* trial does

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3. Petitioner's counsel spent almost his entire closing argument explaining to the jury his method of returning future damages at present value. Respondent's Appendix, p. 5a, *et seq*. Petitioner had designated an expert economist, Dr. Walter Johnson, to testify regarding the present value of Plaintiff's future economic damages, but elected not to call him during the trial of this matter. Respondent's Appendix, p. 12a. Respondent's counsel also gave the jury his present value calculation. Appendix to Petition for Writ, p. 25a, *et seq*.

not establish that the jury failed to follow the trial court's present value instruction and listen to the arguments of counsel nor that "Respondent was allowed to recover his future pecuniary damages . . . without a reduction to present value. . . ." Petition for Writ of Certiorari at 20.

Finally, even if it is assumed *arguendo* that the Third Circuit is correct and that juries are incapable of returning verdicts at present value without expert testimony and are apt to simply total and award the arithmetic sum of the future economic damages, the present jury actually applied the "total offset" method because Respondent's counsel indicated to the jury to use $40,000 as a static net wage loss and not to consider the fact that Plaintiff's wages would continue to go up, as evidenced by Mr. Hildebrand's 10.9% average annual net wage increase. Appendix to Petition for Writ, p. 25a; Respondent's Appendix, pp. 2a; 10a. The "total offset" method has been noted to be "not arbitrary and would not constitute reversible error if employed by a judge in a bench trial, even if the parties had not introduced evidence to support it." *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 354 (1988) (O'Connor, J., dissenting in part). Thus, even assuming *arguendo* that the jury totalled the arithmetic sum of the future economic damages, the verdict returned was at present value by the "total offset" method and Petitioner sustained no prejudice. A holding by the Court that FELA plaintiffs must introduce expert testimony of the present value of future economic damages as an element of their *prima facie* case would not change the outcome of the case at bar in a new trial on the issue of damages because the "total offset" method would place the present value of Respondent's future net wage loss at $640,000 ($40,000 x 16 years) by credibly assuming the 10.9% average annual net wage increase would, at a minimum, offset any reasonable investment opportunities available to the Respondent.

CONCLUSION

It is well-settled law throughout the Nation, except in the Third Circuit, that a plaintiff in an FELA action does not bear the burden of producing expert testimony of the present value of future economic losses as a condition precedent to recovery. A holding to the contrary would require all FELA plaintiffs to hire an expert economist to testify at trial in every case involving claims of future lost wages or future medical expenses, no matter the amount at issue or when the future losses would be incurred. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, STATE OF MISSOURI DATED JULY 18, 1995 AND JULY 20, 1995

* * *

[259] Northern employee?

A: Yes.

Q: And what is your craft that you work for the Burlington Northern?

A: I'm a car man.

Q: And how long have you been a car man?

A: Twenty-eight years.

Q: And let me ask you this, are you familiar with the various jobs that are available for a car men to do in the Springfield area?

A: Yes, I am.

Q: And are those jobs bid out and available based upon seniority?

A: Yes, they are.

Q: And can you tell the jury what you mean by availability based on seniority of a job?

A: Well, they — oldest man in seniority deal has his choice of jobs.

Q: All right. And do you know Ken Byrd?

A: Yes, I do.

Q: Have you worked with Ken Byrd as a car man for the Burlington Northern Railroad?

A: Yes, I have.

Q: And are you aware that he has not been working since I think April of 1992?

[260] A: Yes.

Q: Were you present when he was injured?

A: No.

Q: Let me ask you this. Where on the seniority roster are you in relation to Ken, more seniority or less seniority?

A: Less.

Q: So does that mean that whatever job you have or you hold if Ken were able to work he could hold that with his seniority?

A: Yes.

Q: And then he would be able to earn basically the same wages that you have earned?

A: Yes.

* * *

Appendix A

[266] Q: And the net?

A: Twenty-nine, zero, six, seven, 0, sixty-two.

Q: 0 — seven, 0, sixty-two?

A: Yes, zero, six, two.

Q: Then Mr. Hildebrand in 1992, what was your gross income?

A: Thirty-six thousand, seven hundred and thirty-nine.

Q: And the taxes withheld?

A: Five thousand, six.

Q: Five thousand, six hundred and eighty-one?

A: Yes. And ninety-four cent.

Q: And the net then?

A: Thirty-one, zero, five, seven and — and six cent.

Q: 0, six?

A: 0, six.

Q: And then in 1993?

A: Forty-one, eight hundred and forty-six?

Appendix A

Q: All right, forty-one thousand, eight hundred, thirty?

A: Forty-six.

Q: Forty-six. And the taxes there withheld?

A: Six thousand, six hundred and six — seven

[267] Q: — seven, twenty-four.

A: Six thousand, six hundred and seven — seven dollars and twenty-four cent?

Q: Yes.

A: And the net?

Q: Thirty-five, one sixty-eight and seventy-six cent.

A: And then what about 1994?

Q: Forty-nine, six hundred and sixty-one.

A: Forty nine thousand?

Q: Yes.

A: Six, sixty-one?

Q: Yes.

A: And the taxes?

Q: Nine thousand, two hundred and twenty-two and ninety-three cent.

A: And the net then for 1994?

Q: Four, 0, four, three, eight, four, 0, seven.

A: Seven?

Q: 0, seven.

A: And are those the wages that you have earned working as a car man in the Springfield area?

A: Yes.

Q: For the Burlington Northern Railroad?

* * *

[Commencing July 20, 1995]

[635] fact that Ken Byrd was hurt than any of us do. But the issue for you to decide is what is the fair and just compensation that Ken Byrd is entitled to receive and have those reduced to present value. It's fair and just compensation and those are the things that you have to think about when you go to your jury room to deliberate on this issue. I understand that this is a tough decision and you probably never thought when you came in here on Monday that you were going to be asked to actually evaluate a particular situation. Most of these cases end up being resolved without having to go to the jury. But now the decision is yours and I know that you've listened to the evidence and I know that

you've — you know, were very a tentative but now the arguments are being made by the attorneys and these require the same amount of attention that the testimony that you heard. What we're talking about here, is Ken Byrd fair and just compensation. And how do we arrive at that? We don't look at somebody else's wages, we look at Ken Byrd's wages. We don't look at somebody whose fifteen or twenty people down on the seniority list and say we finally found somebody whose making more money than Ken Byrd so we'll use him as the standard for deciding how much [636] Ken Byrd would make. We think we should look at what Ken Byrd was making. And seniority is a choice, it's not about money. So I think that — let's look at what Ken Byrd was making before he was injured and then decide what fairly and justly compensates Ken Byrd for that, taking into consideration that he has received disability benefits since 1992 and that no matter what you award Ken Byrd he will continue to receive those disability benefits until he reaches age sixty-five at which time he is eligible for his regular retirement. So that is an important thing for you to keep in mind. He's always going to receive that money every year, tax free.

Let's talk about Ken Byrd. The evidence shows that Ken Byrd made thirty-six thousand dollars in 1991. That's the last twelve months he worked and that's the fair starting point for Ken Byrd. However, he had taken out of his paycheck, ten thousand dollars; it's all in evidence, R.R.B. tax, Federal tax, State tax; the Medicare tax. Ten thousand dollars was taken out of his salary on a regular basis which left him with approximately twenty-five thousand, eight hundred dollars at the end of 1991. So that's Ken Byrd's salary through — during the last year that he worked. That's also [637] what he took home, what he actually had available to spend in pocket. Now you remember that Mr. Bauer went through great length and said now what else is there?

What else is there? Well, the main thing, the biggest thing was the cost of health insurance which we can all agree is a high cost. We put it in at six, that's six thousand dollars, that is the health insurance he has to pay. So the total is thirty-one thousand, eight hundred and ninety-four dollars. Now what is Ken Byrd actually losing? Well, there's testimony that he receives nineteen thousand, two hundred dollars every year. And the testimony is that just like his wages would go up so also does that disability benefit go up. You remember that Ken said that in 1994 he was making fifteen hundred and seventy-five dollars a month and now he's up to sixteen, 0, five a month. So it's went up approximately thirty, thirty-five dollars every month. And there will be another cost of living adjusting in 1996 and 1997 and every year for the next fifteen years. So just like his salary would go up, so also would the cost of living adjustment and the disability benefits and therefore the salary increase and the cost of living benefits offset each other. This leaves you with a difference [638] of twelve thousand, six hundred and eighty-four dollars. And that is the difference every year for the next fifteen years that Ken Byrd is going to lose. Now you say well, is that fair and reasonable? We're talking right now about money damages. Money damages; loss earnings, that's what were talking about at this point and time. And this is the calculation, not based on Mr. Hildebrand, not based on somebody making less, not based on somebody making more but solely based on what Ken Byrd was making and that is the standard to compensate Ken Byrd. So we take the twelve thousand dollars and we multiply it by sixteen years because that truly is the amount of time he's going to have until he reaches the age of sixty-five. It's two hundred and three thousand dollars. Now, that is effectively the short fall as to what Ken Byrd would need to make him whole had he worked every one of those fifteen years. He's going to be two hundred and three thousand, one hundred and four dollars short.

Appendix A

Now let's look at the Instruction. This is a very important Instruction; it's Instruction Number Eight. So when you get to the jury room look for Instruction Number Eight. It says, "You must award the Plaintiff such sum as will fairly and justly [639] compensate the Plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence. Any award of — of future pecuniary damages, 'which is what we're talking about here,' must be included at present value. Any award you make is not subject to income tax." So if you returned a verdict for two hundred thousand dollars for Ken Byrd he would not pay one dime of tax on that. He wouldn't pay any Federal tax, he wouldn't pay and State tax, he wouldn't pay any R.R.B. tax, nothing. But the key word here is any award of future pecuniary damages must be included at present value. Now you were all asked a question at the beginning as to whether you could calculate present value pecuniary damages. And unfortunately no one was able to do that and that's because it's a rather complicated thing to do. But that's what the Court's Instruction suggest that you do and actually mandates that you do, is to reduce it to present value. So how do you do this? What is present value? The one question would be how much money do I have to put in the bank so that Ken Byrd will receive twelve thousand, six hundred and ninety-four dollars every year for the next sixteen years; were you at the end of that sixteen years, [640] that bank account is empty. Now how is this going to work? We've already factored in the fact that he's going to get a raise every years and he's going to get a raise in the retirement benefits, so the raises are going to be parallel so we don't have to worry about that. But let's assume that the present value is a hundred and fifty thousand dollars on two hundred thousand dollars over fifteen years. And let's assume that you can get six per cent return on a hundred and fifty thousand dollars which means that he will earn nine

thousand dollars. So that at the end of year one, you'll have a hundred and fifty-nine thousand dollars but you'll have to pay out twelve thousand, six hundred and ninety-four dollars. So you'd end up with less than a hundred and fifty thousand dollars in year two. If we just ballpark this for math purposes; make it thirteen thousand dollars and that will be bringing it down to one, forty-six in year two. You see. Okay. Now I have a hundred and forty-six thousand dollars in the bank. It's going to earn six percent interest and then you multiply that out and come up with nine thousand, seven hundred and sixty dollars. And then you have to pay out twelve thousand dollars off that. So you have another short falling and so on. But [641] that's how you get to present value. And that's — you have to take that all the way through but that is what the Court's instruction is and you are obligated to follow the Court's Instructions because on future pecuniary losses it's got to be reduced to present value so that the time fifteen years is up Ken Byrd is been made whole and all of his wages have basically been paid out of his bank. In addition, you can award him for the pain and suffering that he's experienced over the last several years and what you think he will recover or should be awarded in the future. But I wanted to get it straight in your own mind as to what this Court has instructed you to do; not just put up a bunch of numbers and not just say well, he should earn this, he should earn this and he should earn this and that's what it is folks. That's the gross number because that's the number that Mr. Bauer is putting up. That's not the instruction of the Court. Any award of future pecuniary damages must be included at present value. Now you all agreed to follow the Instructions. You all agreed that whether you liked the Instructions or didn't like the Instructions that you would follow them. And that's why — what I'm asking you to do. I know that it's a difficult decision that you're going to . . .

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[645] regardless of what you verdict is because you are what makes the system work. Thank you very much.

THE COURT: Thank you, Mr. Hempstead.

RESPONDENT'S COUNSEL: This is pretty interesting. Ken Byrd for twenty-seven years worked for this Railroad. Ken Byrd for twenty-seven years did his best to be one of Bo Armstrong's best men. Ken Byrd gave his back to the Railroad because of the way they treated him when he was working there. They treated him negligently then and they're trying to make you treat him just as bad now. Let me ask you a question. Does it cost you the same amount of money as it did five years ago to buy groceries? No. Are we taking into account that people's income goes up? Do they want to do that? No. Now I presented Carlos Hildebrand's earnings to you because I think that is fair. Exhibits Forty — Forty and Thirty-three show that Ken Byrd made more money when he was able to work than Carlos Hildebrand. Read them, take a look at them. In 1991, Carlos made thirty-four thousand, three hundred and eight-six dollars. In 1991, Ken Byrd made thirty-six thousand, five hundred [646] and eighty-one dollars.

* * *

[647] years or less. Just treat him like some piece of meat, have you look at him and you're being told well, this is real nice. We got a guy that can — can't walk now without a cane, who can't sleep more than an hour or two at a time, who's irritable, who can't play with his grand kids, who can't do anything as he did before and we're not going to give you any compensation for

that. The other thing I wanted to point out to you; you got the Instructions. The Court doesn't say any award of future pecuniary damages must be reduced to present value, it said, "it must be included at present value," which is why I asked you, do you pay the same now for groceries that you did five years ago. Heavens, no. Inflation raises the price of everything. People's wages go up, inflation goes up; that pretty well cancels out. So what does that leave you with? You look at the earnings of what a car man, a hard working car man like Ken Byrd could earn, that's about forty thousand dollars a year in my calculations for the damages in this case. And I want to tell you it is a lot of money and it's not easy being a juror and awarding a full fair; just verdict. I now that's not easy but that's your duty. That's your job and when you leave this. . . .

APPENDIX B — NOTICE OF WITHDRAWAL FILED JULY 17, 1995

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.: 922-9869

Division No.: 3

KENNETH E. BYRD,

Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant.

Notice of Withdrawal Of Experts

COMES NOW Defendant, Burlington Northern Railroad Company and withdraws Dr. Walter Johnson, Mr. James England, and Dr. Glen Johnson as experts in this cause of action.

Respectfully submitted,

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